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EXAMINER

FERGUSON, MICHAEL P

ART UNIT

PAPER NUMBER

3679

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PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/723,817	<b>Applicant(s)</b> SADINSKY, STEVEN E.	
	<b>Examiner</b> MICHAEL P. FERGUSON	<b>Art Unit</b> 3679	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 26 May 2009.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-20, 24 and 25 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-20, 24 and 25 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 05 November 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |                                                                                      |                                                                   |
|--------------------------------------------------------------------------------------|-------------------------------------------------------------------|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____                                                          | 6) <input type="checkbox"/> Other: _____                          |

## DETAILED ACTION

### *Claim Rejections - 35 USC § 103*

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1-20, 24 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sadinsky et al. (US 5,664,769) in view of Applicant's admitted prior art (specification page 1 line 28-page 2 line 7) and Fingerson et al. (US 6,126,147).

As to claims 1-3, 8, 9 and 24, Sadinsky et al. disclose a lightweight fence and gate for swimming pools surrounded by a deck having a plurality of sockets, the lightweight fence and gate comprising:

a plurality of poles **11**;

a mesh screen **1F** tensioned between the plurality of poles except at a gate opening in the lightweight fence, the mesh screen having top and bottom bindings;

a gate **G** positioned at the gate opening and comprising a pair of spaced upright support members **31,33**, a first horizontal brace **12** for spacing the pair of spaced upright support members and a length of mesh screen tensioned between the pair of spaced upright support members;

support means **21,22** capable of withstanding lateral tension forces of the mesh screen for supporting and latching the gate, the support means comprising a first gate pole **21** of the plurality of poles attached to one of the pair of spaced upright support

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members on one side of the gate opening and a second gate pole **22** of the plurality of poles attached to the other of the pair of spaced upright support members on another side of the gate opening;

hinges **H** secured to the support means on one side of the gate; and

a latch device **M** secured to the gate and to the support means on an opposite side of the gate from the hinges;

wherein the gate poles are received in the deck and wherein cross members are attached to both of the gate poles (Figures 2,3,5).

Sadinsky et al. fail to disclose a fence and gate wherein each of the plurality of poles includes a plastic insert within each pole and a metal pin having a top length within the pole and extending parallel to a longitudinal axis of the pole and a bottom end protruding from a bottom of each pole, wherein a substantial portion of the top length is fixedly attached along the top length to the insert and wherein the bottom end of the pin is configured to be removably inserted into one of the plurality of sockets in the deck; and wherein the metal pins are received in the pool deck; and wherein the pin is fixedly attached along a top length of the pin to each insert by an adhesive.

Applicant's admitted prior art teaches a fence wherein poles include a plastic insert within each pole and a metal pin having a top length within the pole and extending parallel to a longitudinal axis of the pole and a bottom end protruding from a bottom of each pole, wherein a substantial portion of the top length is fixedly attached along the top length to the insert and wherein the bottom end of the pin is configured to be removably inserted into one of the plurality of sockets in a deck; wherein the pins are

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received in a pool deck; the smaller diameter pins enabling one to use less noticeable, smaller diameter holes, capable of receiving the smaller diameter pins, in the pool decking, wherein the pin is attached to the insert by a screw; the smaller holes being less noticeable when the pool is used without the fence (specification page 1 line 28- page 2 line 7). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the fence and gate disclosed by Sadinsky et al. wherein each of the plurality of poles includes a plastic insert within each pole and a metal pin fixedly attached to each insert as taught by Applicant's admitted prior art in order to enable one to use less noticeable, smaller diameter holes in the pool decking.

Applicant's admitted prior art discloses a fence pole wherein the pin is attached to the insert by a screw, instead of the pin being fixedly attached along a top length of the pin to each insert by an adhesive.

Fingerson et al. teach a fence pole **26** wherein a pin **32** is attached to the pole by either a screw or along a top length of the pin by adhesive bonding; both the screw and adhesive bonding securely fixedly attaching the pin to the pole (Figures 1,3B,5, column 2 lines 64-66). Inasmuch as the references disclose screws and adhesive bonding as art recognized equivalents for securely attaching a pin within a fence pole, it would have been obvious to one of ordinary skill in the exercise art to substitute one for the other.

In re Fout, 675 F.2d 297, 301, 213 USPQ 532, 536 (CCPA 1982).

As to claim 4, Sadinsky et al. disclose a fence and gate wherein the first gate pole **21** and the second gate pole **22** each include a cross member **24,25** attached to one of the pair of spaced upright support members **31,33** (Figure 3).

As to claim 5, Sadinsky et al. disclose a fence and gate wherein the gate **G** includes a generally U-shaped frame opening upwardly with a first horizontal brace **13** secured to lower ends of the pair of spaced upright support members **31,33** and a second horizontal brace **CB** secured to the pair of spaced upright support members on a pool side of the mesh screen **IF** at a height well below the top of the gate fabric (Figure 3).

As to claim 6, Applicant's admitted prior art does not disclose any structural or functional significance as to the particular plastic of the insert (specification page 1 line 29-page 2 line 7). Sadinsky et al. in view of Applicant's admitted prior art fails to disclose a fence and gate where the insert comprises polyvinylchloride.

The Appellant is reminded that the selection of a known material based upon its suitability for the intended use, wherein no structural or functional significance as to the particular material of an element is disclosed, is a design consideration within the skill of the art. In re Leshin, 227 F.2d 197, 125 USPQ 416 (CCPA 1960). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the fence and gate disclosed by Sadinsky et al. in view of Applicant's admitted prior art to have an insert comprising polyvinylchloride as Applicant's admitted prior art does not disclose any structural or functional significance as to the particular plastic of the insert, as polyvinylchloride is a durable, economic, readily available plastic

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material known within the art, and as such selection of a known material is a design consideration within the skill of the art which would yield expected and predictable results.

As to claim 7, Applicant's admitted prior art does not disclose any structural or functional significance as to the particular metal of the pin (specification page 1 line 29- page 2 line 7). Sadinsky et al. in view of Applicant's admitted prior art fails to disclose a fence and gate where the pin comprises stainless steel.

The Appellant is reminded that the selection of a known material based upon its suitability for the intended use, wherein no structural or functional significance as to the particular material of an element is disclosed, is a design consideration within the skill of the art. In re Leshin, 227 F.2d 197, 125 USPQ 416 (CCPA 1960). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the fence and gate disclosed by Sadinsky et al. in view of Applicant's admitted prior art to have a pin comprising stainless steel as Applicant's admitted prior art does not disclose any structural or functional significance as to the particular metal of the pin, as stainless steel is a durable, economic, readily available metal material known within the art, and as such selection of a known material is a design consideration within the skill of the art which would yield expected and predictable results.

As to claims 10-13, Sadinsky et al. disclose a lightweight fence and gate for swimming pools surrounded by a deck having a plurality of sockets, the lightweight fence and gate comprising a plurality of poles **11**;

a first length of mesh screen **1F** tensioned between the plurality of poles except at a gate opening in the lightweight fence defining the fence;

a gate **G** in the fence including a frame having a pair of spaced upright support members **31,33** and a second length of mesh screen tensioned between the pair of upright support members of the gate; and

support means **21,22** to which the first length of mesh screen is attached for supporting the fence and gate and for latching the gate including a truss structure capable of isolating lateral tension forces of the first length of mesh screen on opposite sides of the gate, the support means comprising at least one gate pole **21,22** of the plurality of poles on each opposite side of the gate opening attached to one of the pair of spaced upright support members (Figures 2,3,5).

Sadinsky et al. fail to disclose a fence and gate wherein each of the plurality of poles includes a plastic insert within each pole and a metal pin having a top length within the pole and extending parallel to a longitudinal axis of the pole and a bottom end protruding from a bottom of each pole and configured to be removably insertable into one of the plurality of sockets in the deck, wherein a substantial portion of the top length is fixedly attached along the top length to the insert; and wherein the pin is fixedly attached along a top length of the pin to each insert by an adhesive.

Applicant's admitted prior art teaches a fence wherein the poles include a plastic insert within each pole and a metal pin having a top length within the pole and extending parallel to a longitudinal axis of the pole and a bottom end protruding from a bottom of each pole and configured to be removably insertable into one of the plurality of sockets



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in the deck, wherein a substantial portion of the top length is fixedly attached along the top length to the insert; the smaller diameter pins enabling one to use less noticeable, smaller diameter holes, capable of receiving the smaller diameter pins, in the pool decking; the smaller holes being less noticeable when the pool is used without the fence (specification page 1 line 28-page 2 line 7). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the fence and gate disclosed by Sadinsky et al. wherein each of the plurality of poles includes a plastic insert within each pole and a metal pin attached to each insert as taught by Applicant's admitted prior art in order to enable one to use less noticeable, smaller diameter holes in the pool decking.

Applicant's admitted prior art discloses a fence pole wherein the pin is attached to the insert by a screw, instead of the pin being fixedly attached along a top length of the pin to each insert by an adhesive.

Fingerson et al. teach a fence pole **26** wherein a pin **32** is attached to the pole by either a screw or along a top length of the pin by adhesive bonding; both the screw and adhesive bonding securely fixedly attaching the pin to the pole (Figures 1,3B,5, column 2 lines 64-66). Inasmuch as the references disclose screws and adhesive bonding as art recognized equivalents for securely attaching a pin within a fence pole, it would have been obvious to one of ordinary skill in the exercise art to substitute one for the other. In re Fout, 675 F.2d 297, 301, 213 USPQ 532, 536 (CCPA 1982).

As to claims 14-17, Sadinsky et al. disclose a method for installing a self closing gate in a tensioned removable swimming pool fence comprising a plurality of poles **11**

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interconnected by flexible mesh fencing **IF** except at a gate opening, the method comprising:

removably inserting the plurality of poles (capable of including a pin) into a deck surrounding a swimming pool with the flexible mesh fencing in tension to maintain the fence in tension, the deck having drilled sockets configured to receive the poles (capable of receiving a pin), wherein the first and last poles of the plurality of poles define the gate opening, the first and last poles each constituting a pair of gate poles of the plurality of poles connected to each other to define a support structure **21,22** capable of absorbing the tension of the flexible mesh fencing;

fabricating a gate **G** including a pair of side rails **31,33**, each side rail of the pair of side rails attached to one of the pair of gate poles of the plurality of poles, a cross rail **12** and flexible mesh tensioned between the pair of side rails;

hinging the first of the pair of side rails of the gate to the first of the pair of gate poles; and

installing a latch **M** between the second of the pair of side rails of the gate and the second of the pair of gate poles of the tensioned fence;

whereby the gate is free to open and close without interference by the tension of the mesh fencing (Figures 2, 3 and 5).

Sadinsky et al. fail to disclose a method wherein the plurality of poles include a plastic insert within each pole and a metal pin having a top length within the pole and extending parallel to a longitudinal axis of the pole and a bottom end protruding from a bottom of each pole, wherein a substantial portion of the top length is fixedly attached

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along the top length to the insert; and wherein the pin is attached along a top length of the pin to each insert by an adhesive.

Applicant's admitted prior art teaches a fence wherein the poles include a plastic insert within each pole and a metal pin having a top length within the pole and extending parallel to a longitudinal axis of the pole and a bottom end protruding from a bottom of each pole, wherein a substantial portion of the top length is fixedly attached along the top length to the insert; the smaller diameter pins enabling one to use less noticeable, smaller diameter holes, capable of receiving the smaller diameter pins, in the pool decking; the smaller holes being less noticeable when the pool is used without the fence (specification page 1 line 28-page 2 line 7). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the method disclosed by Sadinsky et al. wherein the plurality of poles include a plastic insert within each pole and a metal pin attached to each insert as taught by Applicant's admitted prior art in order to enable one to use less noticeable, smaller diameter holes in the pool decking.

Applicant's admitted prior art discloses a fence pole wherein the pin is attached to the insert by a screw, instead of the pin being fixedly attached along a top length of the pin to each insert by an adhesive.

Fingerson et al. teach a fence pole **26** wherein a pin **32** is attached to the pole by either a screw or along a top length of the pin by adhesive bonding; both the screw and adhesive bonding securely fixedly attaching the pin to the pole (Figures 1,3B,5, column 2 lines 64-66). Inasmuch as the references disclose screws and adhesive bonding as

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art recognized equivalents for securely attaching a pin within a fence pole, it would have been obvious to one of ordinary skill in the exercise art to substitute one for the other.

In re Fout, 675 F.2d 297, 301, 213 USPQ 532, 536 (CCPA 1982).

As to claims 18-20 and 25, Sadinsky et al. disclose a gate **G** and a pair of gate poles **21,22** for the gate in a tensioned removable swimming pool fence, each of the pair of gate poles comprising:

a lower end; and

the pole (capable of receiving a pin) being configured to be inserted into a drilled socket in a pool deck;

the gate comprising a frame having a pair of spaced upright support members **31,33**, wherein each of the pair of gate poles is attached to one of the pair of spaced upright support members to allow the gate to be free to open and close without interference from the tension of the removable swimming pool fence (Figures 2, 3 and 5).

Sadinsky et al. fail to disclose a gate and pair of gate poles wherein each of the pair of gate poles comprises a plastic insert within the lower end of each pole and a metal pin having a top length within the pole and extending parallel to a longitudinal axis of the pole and a bottom end protruding from a bottom of each pole, wherein the top length is fixedly attached along the top length to the insert, the pin having a diameter smaller than a diameter of the pole and a cylindrical bottom portion that protrudes from the lower end, the cylindrical bottom portion terminating at a substantially flat bottom surface, the cylindrical bottom portion of the pin being configured to be removably

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insertable into a drilled socket in a pool deck; and wherein the pin is fixedly attached to the insert by an adhesive.

Applicant's admitted prior art teaches fence poles wherein each pole comprises a plastic insert within a lower end of each pole and a metal pin having a top length within the pole and extending parallel to a longitudinal axis of the pole and a bottom end protruding from a bottom of each pole, wherein a substantial portion of the top length is fixedly attached along the top length to the insert, the pin having a diameter smaller than a diameter of the pole and a cylindrical bottom portion that protrudes from the lower end, the cylindrical bottom portion terminating at a substantially flat bottom surface, the cylindrical bottom portion of the pin being configured to be removably insertable into a drilled socket in a pool deck; the smaller diameter pins enabling one to use less noticeable, smaller diameter holes, capable of receiving the smaller diameter pins, in the pool decking; the smaller holes being less noticeable when the pool is used without the fence (specification page 1 line 28-page 2 line 7). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the gate and pair of gate poles disclosed by Sadinsky et al. wherein each of the pair of gate poles comprises a plastic insert within each pole and a metal pin attached to each insert as taught by Applicant's admitted prior art in order to enable one to use less noticeable, smaller diameter holes in the pool decking.

Applicant's admitted prior art disclose a fence pole wherein the pin is attached to the insert by a screw, instead of the pin being fixedly attached along a top length of the pin to each insert by an adhesive.

Fingerson et al. teach a fence pole **26** wherein a pin **32** is attached to the pole by either a screw or along a top length of the pin by adhesive bonding; both the screw and adhesive bonding securely fixedly attaching the pin to the pole (Figures 1,3B,5, column 2 lines 64-66). Inasmuch as the references disclose screws and adhesive bonding as art recognized equivalents for securely attaching a pin within a fence pole, it would have been obvious to one of ordinary skill in the exercise art to substitute one for the other. In re Fout, 675 F.2d 297, 301, 213 USPQ 532, 536 (CCPA 1982).

### ***Response to Arguments***

3. Applicant's arguments filed May 26, 2009 have been fully considered but they are not persuasive.

Examiner acknowledges the declaration under 37 CFR 1.132 filed August 5, 2008, entitled DECLARATION OF STEVEN E. SADINSKY UNDER 37 CFR 132. However, such declaration is not persuasive as Applicant has failed to provide any evidence of unexpected results over the Applicant's admitted prior art (specification page 1 line 28-page 2 line 7). Examiner notes that Applicant's admitted prior art teaches that the use of inserts and pins within pool deck fence poles is well known within the art, independent of whether or not the use of such inserts and pins to directly support gate uprights is perceived to provide adequate stability.

As to claims 1, 10, 14 and 18, Attorney argues that:

Applicant's admitted prior art teaches away from the use of inserts and pins within gate poles, *as such was perceived to decrease stability of a gate.*

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Examiner disagrees. As to claims 1, 10, 14 and 18, Applicant's admitted prior art teaches a fence wherein poles each include a plastic insert within each pole and a metal pin fixedly attached to each insert, the pin protruding from a bottom of each pole, wherein the pin is configured to be inserted into a deck; the smaller diameter pins enabling one to use less noticeable, smaller diameter holes, capable of receiving the smaller diameter pins, in the pool decking; the smaller holes being less noticeable when the pool is used without the fence (specification page 1 line 28-page 2 line 7).

Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the fence and gate disclosed by Sadinsky et al. wherein the poles include a plastic insert within each pole and a metal pin fixedly attached to each insert as taught by Applicant's admitted prior art in order to enable one to use less noticeable, smaller diameter holes in the pool decking.

Furthermore, Examiner notes that Applicant's admitted prior art teaches that the use of inserts and pins within pool deck fence poles is well known within the art, independent of whether or not the use of such inserts and pins to directly support gate uprights is perceived to provide adequate stability.

As to claims 1, 10, 14 and 18, Attorney argues that:

Sadinsky et al. in view of Applicant's admitted prior art and Fingerson et al. fails to disclose a fence and gate wherein each of the plurality of poles includes a pin having a top length within the pole and extending parallel to a longitudinal axis of the pole and a bottom end protruding from a bottom of each pole, wherein a

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substantial portion of the top length is fixedly attached along the top length to the insert.

Examiner disagrees. As to claim 1, 10, 14 and 18, Applicant's admitted prior art teaches a fence wherein poles include a pin having a top length within the pole and extending parallel to a longitudinal axis of the pole and a bottom end protruding from a bottom of each pole, wherein a substantial portion of the top length is fixedly attached along the top length to the insert; the smaller diameter pins enabling one to use less noticeable, smaller diameter holes, capable of receiving the smaller diameter pins, in the pool decking, wherein the pin is attached to the insert by a screw; the smaller holes being less noticeable when the pool is used without the fence (specification page 1 line 28-page 2 line 7). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the fence and gate disclosed by Sadinsky et al. wherein each of the plurality of poles includes a plastic insert within each pole and a metal pin fixedly attached to each insert as taught by Applicant's admitted prior art in order to enable one to use less noticeable, smaller diameter holes in the pool decking.

### ***Conclusion***

4. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not



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mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael P. Ferguson whose telephone number is (571)272-7081. The examiner can normally be reached on M-F (6:30am-3:00pm).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Daniel P. Stodola can be reached on (571)272-7087. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

MPF  
07/31/09

/Michael P. Ferguson/  
Primary Examiner, Art Unit 3679